

2

CONSUMER CONTRACTS IN MAINE

§ 2. 1. Introduction

This consumer rights chapter describes the basic contract laws that apply when you make a consumer purchase. It contains the following sections:

- § 2. 2. When Is A Consumer Contract Binding?**
- § 2. 3. Certain Contracts Are Required By Law To Be In Writing**
- § 2. 4. Contracts That Are Unenforceable**
- § 2. 5. Who Are The Parties To A Contract?**
- § 2. 6. The Difference Between Express And Implied Warranties**
- § 2. 7. When Is A Contract Breached?**
- § 2. 8. How Do Courts Interpret Contracts?**
- § 2. 9. Remedies For Breach Of Contract**
- § 2. 10. Accord And Satisfaction**
- § 2. 11. Contract Release**
- § 2. 12. Negotiating A Contract**
- § 2. 13. Questions To Ask When Analyzing A Consumer Contract**

§ 2. 2. When Is A Consumer Contract Binding?

A contract is a legally enforceable promise between you and the seller. It describes the responsibility buyers and sellers have to each other when goods or services are exchanged. Contracts can be *written*, *oral*, or even *implied*.

A binding contract can be a lease on an apartment or a purchase order for a new car. It can be a written agreement to buy a set of encyclopedias from a door to door salesperson or an oral promise to pay a baby sitter \$1.50 per hour for taking care of your child. Even the purchase of a can of soup from a supermarket is a contract.

From time out of mind, the “common law” (judge-made law as opposed to statutes passed by the Legislature) has required that legally enforceable contracts must have these four elements:

- A. An *offer* to perform an act;
- B. An *acceptance* of the offer;
- C. The act to be performed must be of *some value* (“*consideration*”) to both parties.
- D. There must be *mutual understanding* by both parties as to the basic obligations of the contract.¹

If even one of these four elements is missing, the contract might not be enforced by a court.

A contract can be oral or written, but a court will not enforce it if the agreement is missing essential terms or is otherwise too vague or indefinite as to the nature and the extent of the parties’ obligations.

§ 2.3. Certain Contracts Are Required By Law To Be In Writing

The Maine Uniform Commercial Code (U.C.C.) sets forth contract law regulating the sale of goods by a merchant to consumers.² The U.C.C. and other statutory provisions, principally the Statute of Frauds³ require certain contracts to be in writing before a court will enforce them. Examples of such contracts are:

- A. Contracts for the sale of goods costing \$500 or more;⁴
- B. Contracts for the sale of land;⁵
- C. Contracts which cannot be performed within one year; for example, if you agree today to move into a new apartment the first of next month and rent for a year, your rental agreement must be in writing because the terms of the contract cannot be completed within one year of the date on which you agreed;⁶
- D. Contracts in which you guarantee to pay the debt of another person;⁷
- E. Contracts to pay debts legally discharged in a bankruptcy proceeding.⁸

The U.C.C. sets forth three exceptions to the requirement of a written contract for goods costing \$500 or more. These contracts are enforceable without a written contract:

- A. You ordered custom-made items such as a tailored suit or drapes;⁹
- B. You have already paid for goods or services or they have already been delivered and

¹ In cases where both parties make a mistake and enter into a contract that does not express their mutual interests, courts may order that the contract be “rescinded” (voided, as if it had never been entered into). *See Miller v. Lentine*, 495 A.2d 1229, 1231 (Me. 1985); *Roy v. Davis*, 553 A.2d 663, 664 (Me. 1989) (a legally binding contract must have the express or implied mutual assent of the parties and must be definite enough that a court can fix exactly the legal liabilities of the parties).

² *See generally* 11 M.R.S.A. §§2-101 to 2-725.

³ 33 M.R.S.A. §§ 51-53. The purpose of the Statute of Frauds is to “prevent perjury and fraud.” However, a defendant in a contract enforcement action may waive the statute’s protection, allow verbal evidence of the contract, and become bound by it. *Dehahn v. Innes*, 356 A.2d 711, 717-18 (Me. 1976).

⁴ 11 M.R.S.A. § 2-201(1).

⁵ 33 M.R.S.A. § 51(4).

⁶ 33 M.R.S.A. § 51(5).

⁷ 33 M.R.S.A. § 51(2).

⁸ 33 M.R.S.A. § 51(6).

⁹ 11 M.R.S.A. § 2-201(3)(a).

accepted;¹⁰

C. You admit in court that, in fact, you did have a contract.¹¹

§ 2.4. Contracts That Are Unenforceable

Courts have often refused to enforce contracts that are significantly unfair and lacking in good faith¹². Usually they are unconscionable¹³ contracts in which one of the four elements of the contract (see § 2.2) is explicitly or implicitly missing. Here are some of the more common kinds of unenforceable contracts:

- A. You are incapable of *understanding* the contract because you are insane, senile or otherwise mentally deficient.¹⁴
- B. You are *too young* to enter into a legally binding agreement. If you enter into a contract when you are a minor (younger than 18) and still living with your parents, the contract is not enforceable unless you agree to the terms of the contract in writing when you turn 18 or unless a legal guardian also signs the contract. You can cancel the contract and receive back the entire purchase price. The exceptions to this rule are when the contract is for real estate, or higher education, or for an actual “necessity” such as needed food, shelter, or educational or medical expenses.¹⁵ This law can lead to such results as a minor purchasing a car, wrecking it, and then not being required to pay for it. *See Gillis v. Whitley’s Discount Sales, Inc.*, 319 S.E.2d 661 (N.C. 1984). Merchants sell to minors at their own risk. When a minor joins a record, CD or video club (*e.g.*, a negative option contract), the minor has *not* entered into an enforceable contract. Once the minor becomes an adult, the minor can “ratify” the contract (*e.g.*, keep ordering new records) and the contract then becomes binding. Some states hold that the merchant can charge the minor for depreciation of the item or an equivalent “rental” fee, but this does not appear to be the case in the state of Maine. Maine seems to follow the rule that strictly protects minors. *See Utterstrom v. Kidder*, 124 Me. 10,13 (1924) (the court refused to make any allowance for depreciation in an action by a minor to disaffirm the purchase of a truck and recover payments made, even though it appeared that the truck had been allowed to stay out in the weather until it was seriously damaged).
- C. The performance of the contract calls for an *illegal act*. For instance, a contract with an unlicensed electrician to rewire your home is unenforceable. Electricians are required by law to be licensed. If an unlicensed electrician were to rewire your home, he would be breaking the law.¹⁶
- D. You are *tricked* into signing. Deceit-intentional or unintentional- which misleads you

¹⁰ 11 M.R.S.A. § 2-201(3)(c).

¹¹ 11 M.R.S.A. § 2-201(3)(b).

¹² *See* 33 M.R.S.A. § 1-203; Restatement (Second) Of Contracts § 205 (1979).

¹³ *See* 11 M.R.S.A. § 2-302 of the Uniform Commercial Code, which states that courts may refuse to enforce “unconscionable” contracts. A contract can be unconscionable both procedurally (unfairness in the formation of the contract) and substantively (the terms are disproportionately favorable to the more powerful party).

¹⁴ Restatement (Second) of Contracts, § 178(1)(1981).

¹⁵ 33 M.R.S.A. § 52. *See Spaulding v. New England Furniture*, 147 A.2d 916 (Me. 1959) (minor who was married and living with his wife and child liable for value of “necessaries” purchased for his household). *See also* Restatement (Second) Of Contracts § 12(2)(b), § 12, comment f (1981).

¹⁶ Restatement (Second) of Contracts, § 178 (1)(1981).

into signing the contract renders the contract unenforceable. Such deceit can include the failure to disclose a material fact (a fact that is known to the seller and which would change your decision to purchase the item at the agreed price).¹⁷ Such contracts are unenforceable even if they have a so-called “merger” clause, which states the written contract comprises the entire agreement, no matter what promises the salesperson might have made.

- E. You are *forced* to sign the contract. For example, a contract is not valid if you sign it against your will or under threat of physical harm.¹⁸
- F. You sign under *undue influence*. A parent, child, doctor, someone upon whom you are financially dependent or anyone else who uses your special relationship to pressure you to sign a contract is exercising undue influence. If you can prove undue influence, you can have the contract voided.¹⁹
- G. Both parties to the contract make the *same mistake*. If one party makes a mistake either in making an offer or in accepting one, the contract is binding and enforceable. For instance, if you thought the record collection you agreed to sell consisted of 20 records and you discover later that it consisted of 25, you still have a binding contract. However, if both you and your friend who made the offer thought the collection was made up of 20 records, the contract may not be binding.²⁰ A unilateral mistake is grounds for voiding a contract only if the other party had reason to know that the mistaken party was operating under a misimpression.²¹
- H. The contract’s terms are *unconscionable* (shocking to the conscience) (11 M.R.S.A. § 2-302). Some courts have ruled contracts unconscionable because the consumer was charged an extremely high price or because unfair terms were not subject to bargaining between the parties (a contract of adhesion).²²
- I. The contract contains *misleading terms* - usually in small print - buried in a paragraph having little or nothing to do with the overall agreement. The contract may be “unconscionable” and unenforceable.
- J. A merchant’s sales technique was so deceptive or the contract was so unfair as to be in violation of the Maine Unfair Trade Practices Act (5 M.R.S.A. § 205-A - 214) (*see*

¹⁷ *Id.* at §164(1). *See Southwest Sunsets, Inc. v. Federal Trade Commission*, 785 F.2d 1431 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 109 (1986). In this case, the appellate court upheld the F.T.C. decision that a developer’s representation and omissions in connection with the sale of rural land were deceptive. This decision applied the deception standard contained in the F.T.C. Policy Statement on Deceptive Acts and Practices. *See also V.S.H. Realty, Inc. v. Texaco, Inc.*, 757 F.2d 411 (1st Cir. 1985).

¹⁸ *Id.* at § 12(a), 174.

¹⁹ *Id.* at § 177.

²⁰ *Id.* at § 152.

²¹ *Peoples Heritage Bank v. Pease*, 838 A. 2d 354, 355 (Me. 2003).

²² *See Kugler v. Romain*, 279 A.2d 640 (N.J. 1971) (encyclopedia sold door-to-door at unfairly high price was fraudulent sale); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). Even if a party signs a form contract and even if the party had an opportunity to read the contract, an unexpected or particularly oppressive provision in the agreement may be unenforceable for lack of agreement. *The Restatement (Second) of Contracts* § 211 (3) (1981) indicates that a provision in a form contract that a party uses regularly in its dealings with others is invalid if the parties should reasonably know that the other contracting party (i.e., the consumer) would not agree to the contract if the provision were known. *Id.* at § 211(3). These form contracts are sometimes referred to as “contracts of adhesion.” Such “adhesion” contracts might also violate the U.C.C. unconscionability provision (11 M.R.S.A. § 2-302) or the Maine Unfair Trade Practices Act (5 M.R.S.A. § 207). *See Dairy Farm Leasing Co., Inv. v. Hartley*, 395 A.2d 1135, 1139 (Me. 1978) (in a footnote the Law Court suggested that a standard-form printed contract submitted to the other party on a “take it or leave it” basis could be found to be an unconscionable contract (a contract of adhesion) in violation of the Uniform Commercial Code, 11 M.R.S.A. § 2-302).

Chapter 3, Unfair Trade Practices In Maine).

§ 2. 5. Who Are The Parties To A Contract?

In most contract negotiations, a consumer will deal with an agent (employee) and not the principal (employer). As long as the agent does not exceed his authority and does not intentionally mislead you,

the principal will be responsible for the agent's actions. For example, in § 20.4 of Chapter 20, Consumer Rights When You Buy A Home, we discuss when a real estate agent might be responsible for negligent or intentional misrepresentations.

Further, principals can ratify an agent's action even if it is outside the scope of the agent's responsibility. Suppose a door-to-door salesman of vacuum cleaners promises in writing a more generous warranty than is normally offered by the manufacturer. The salesman's company will be bound by the promise if it later reviews the consumer's contract and accepts it.

In many contract disputes your first step in determining the duties of the different parties should be to chart the lines of contractual responsibilities. For example suppose you have hired a general contractor to build an addition to your house. The general contractor then hires a subcontractor to install the required plumbing and the plumber's work turns out to be defective. Is the plumber liable to you? No. Your contract is with the general contractor and he remains responsible. The general contractor (the delegant) has only delegated his duties to the plumber (the delegate). If you cannot resolve the plumbing dispute and the court orders the general contractor to pay you damages (your costs to repair the plumbing), the general contractor can in turn look to the plumber for relief.²³

The terms of many "form" contracts are not negotiated. Before signing, make sure you understand your obligations when you purchase such items as cell phones, credit cards, satellite dishes.

§ 2. 6. The Difference Between Express And Implied Warranties

The warranty is the part of your contract which assures you of the quality and dependability of the goods or services you buy. Warranties can be *express* (an oral or written statement of the seller) or *implied* (created by statute or by court decision).

Express warranties are oral or written promises the seller or manufacturer specifically makes about a product or service. Sometimes both the seller and the manufacturer give express warranties. Express warranties are not required by law, but they usually accompany most quality products.²⁴

In addition to express warranties, under Maine law whenever you purchase a new or used consumer good or service (*except used cars*) you automatically receive an *implied warranty*. This is true even when the seller or manufacturer does not make an express warranty. When you do have an

²³ You may also be able to sue the plumber directly, under the theory that you are a "third party beneficiary" of the contract between the general contractor and the plumber. See Restatement (Second) of Contracts § 302(e)(1981).

²⁴ In addition to express warranties consumers are sometimes asked to purchase a "service contract." As the name implies, service contracts are new contracts and not warranties that are provided with the item. Though some sellers refer to them as "extended warranties," they are not warranties. Warranties come with products at no extra cost. A service contract is a promise of service in exchange for fee. If you have a good warranty you probably will not need to buy the extra protection a service contract offers. In fact, you may be buying coverage you already have under your express or implied warranty. As with any other contract, read all the provisions and weigh the terms carefully before you buy. See Chapter 6 of this Guide at §§ 6.5 and 6.10.

express warranty, the implied warranty may provide you with additional coverage and remain in effect even after your written warranty expires. As a Maine consumer you have probably seen written warranties that say you have no implied warranties. You have probably also seen the following statement:

Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.

Maine is one of those states. Under Maine law when purchasing consumer goods, your implied warranty rights cannot be modified or limited in any way. (11 M.R.S.A. § 2 316(5) (a)). So, as long as you buy in Maine, you can ignore the warranty language that attempts to limit your implied warranty rights.

There are two types of implied warranties:

- A. The *warranty of merchantability* promises that the product you buy is at least of average quality and fit for ordinary use.²⁵ That is, a lawn mower must mow; a food processor, process; a wood splitter must split.
- B. The *warranty of fitness for a particular purpose*, as its name implies, promises that the product you buy will be suitable for a specific use.²⁶ When you buy a product based on the seller's advice that it can be used for a particular purpose, the advice creates an implied warranty of fitness for a particular purpose. For instance, if you rely on a seller's expertise to help you choose paint for your car, the seller is creating an implied warranty that the paint is fit for the particular purpose of painting your car. If you apply the paint appropriately, and it flakes off a few weeks later, you have recourse against the seller under Maine's implied warranty law. For a more thorough discussion of implied warranty rights, see Chapter 4 of this Guide.

§ 2. 7. When Is A Contract Breached?

If one party does not perform according to the terms of the agreement, the contract has been "breached." If a carpenter fails to finish the job or a home buyer could not make the entire payment for a new home, a breach of contract has occurred. The remedies for the victim of a breach of contract depend on whether there are major or minor losses (damages). If you are on the receiving end of a minor breach, the contract will most likely remain intact, though you will probably be entitled to receive payment for losses you suffered. If the breach is major, you can often go one step further. You can cancel the contract, and still recoup your losses from the other party.

In determining whether the breach is major or minor, the judge will inquire into whether there has been *substantial performance* under the contract. In a home construction contract, for instance, did the contractor omit only the shutters? Or did he forget the roof?

Home construction is one area in which disputes frequently occur over work performance. In these disputes, homeowners often say "shoddy and incomplete" work is their reason for breaking the contract and withholding payment. Contractors, on the other hand, will often reply that the homeowner is too "picky," and that the basic terms of the contract have been met.

The Surety Development Corp. used this substantial compliance argument in a 1963 Delaware lawsuit against a customer who refused to pay \$16,385 for a prefabricated home. By the contract completion date the contractor had not yet installed a blacktop driveway and walkway. Nevertheless,

²⁵ 11 M.R.S.A. § 2-314(c).

²⁶ 11 M.R.S.A. § 2-315.

the court²⁷ ruled in favor of the contractors. The court concluded that Surety Development had constructed a minimally livable house and that this constituted substantial performance under the contract. The judge wrote: “When is a house a home? In our context, a house is a home when it can be lived in.” Defendant Grevas was ordered to pay the \$16,385 for the house, and Surety Development was ordered to finish the work.

Missing a contract completion date, however, can be a major breach even if there has been substantial performance. This is often the case when a second contract depends on the timely completion of the first contract.

Suppose Grevas had arranged to sell his new home immediately after the completion date designated in the contract, in this case, 4 P.M. on September 27, 1961. Imagine that Grevas had drafted the contract to read:

Grevas promises to pay Surety Development \$16,385 on the condition the home is completely constructed no later than 4 P.M., September 27, 1961. It is expressly agreed that time is of the essence.

If this were the contract, then Surety Development’s failure to completely finish the house could be viewed as a major breach. The courts could well find that meeting the 4 P.M. deadline was a prerequisite to payment. Such disputes are why the Legislature in 1989 enacted the Home Construction Contract Law (10 M.R.S.A. §§ 1486-90), which requires detailed written contracts for home construction or repairs costing more than \$1,400. *See* Chapter 17 and Chapter 18 in this Guide.

What happens if a home contractor goes out of business before the work is done? Certainly, this would be a major breach of any contract. However, the homeowner would not be able to keep the improvements made on the property without making any payment at all. The homeowner is not entitled to “unjust enrichment.” In other words, the homeowner must pay for the services already performed by the contractor, less any damages the homeowner has suffered. Such damages might include the cost of hiring a new contractor to finish the work.

A dispute between a homeowner and a contractor is a breach of a “service contract.” For “consumer goods” contracts, the standard for deciding whether a breach is major is less stringent. Services cannot be taken back easily; manufactured goods are more easily returned or replaced. However, a major contract breach may still occur in a goods contract even though substantial performance has been made. Suppose you sign a contract with an automobile dealer to purchase a new Maserati. In the contract, you specify that you want the car to be red. The contract will be breached if the dealer delivers a black Maserati. If the dealer could not quickly obtain a suitable replacement, you could demand your money back.

§ 2. 8. How Do Courts Interpret Contracts?

A warning to consumers: make sure all-important promises are included in the contract you sign. If you leave a vital piece of information out, you may be vulnerable and defenseless if a contract dispute arises later.

Traditionally, courts base their decisions on the evidence before them. In many cases, the written contract is all the evidence the judge needs. When this happens, the written contract is considered a “total integration” of the party’s intentions. Judges will then abide by the “parol evidence” rule, which

²⁷ *Surety Development Corp. v. Grevas*, 192 N.E.2d 145 (Del. 1963).

prevents either party from introducing evidence not part of the written contract.²⁸

Fortunately for consumers, there are exceptions to the parol evidence rule. When a contract is based on illegal acts, duress, obvious mistakes, or misrepresentations of facts, a judge will probably look beyond the “four corners” of the written contract to make a decision.

This happened in the 1974 Delaware case of *Knisley v. Ed Fine Automobile*.²⁹ Car buyer Knisley, concerned that a high-powered Oldsmobile had been used for racing, was assured by the car salesman that it had never come near a racetrack. However, that assurance was somehow omitted from the written contract. Knisley began experiencing mechanical problems with the car and later discovered

the car had indeed been used for racing. He sued the dealer. The judge ruled against Ed Fine Automobile’s request that the parol evidence rule be applied to exclude any oral evidence, and ordered that the dealer give back Knisley’s money in exchange for the defective car.

In general, courts are willing to consider evidence not written into a contract if it is consistent with the intent of the parties and will help clarify ambiguous terms.³⁰ This is true even if the consumer has signed a form contract with a “boiler plate” section, often written in fine print at the bottom of the page, that states that the writing represents all the terms of the contract (*see* “contracts of adhesion,” § 2.4 (H) and § 3.4).

Again, consumers can avoid these disputes by simply including all pertinent information and promises in the contract.

§ 2. 9. Remedies For Breach Of Contract

Laws are designed to protect you from unjust suffering as a result of a breach (violation) of contract. Courts generally give injured parties the “benefit of the bargain.” In other words, you should be placed in the economic position you would have occupied had the contract not been breached. You should be reimbursed.³¹ Courts will require you to make a reasonable effort to minimize your damages when asking for reimbursement from the other party.

A. Contract For Services

When a contract for services is breached you should be reimbursed for your remaining rights to performance, not on the total contract price paid by the injured party.³² You should also be reimbursed for incurred expenses.³³ If a garage mechanic fails to properly repair your car and you must have it

²⁸ *See e.g., Everett v. Rand*, 131 A.2d 205 (Me. 1957).

²⁹ 319 A.2d 33 (Del. 1974).

³⁰ *Fitzgerald v. Gamester*, 658 A.2d 1065 (Me.1995) (trial court properly allowed evidence that clarified ambiguous terms in a real estate contract). In some instances courts will read implied terms into a contract, *See* 3 Corbin on Contracts §561 (1994 Supp.) (a court can adopt implied terms which reflect the good faith of the parties). In *Acadia Ins. v. Buck Const. Co.*, 756 A.2d 515, 517 (Me. 2000) the Court defined “ambiguous language” as follows: language is considered to be ambiguous if it is reasonably susceptible to different interpretations.

³¹ This is called the “expectation” measure of damages. When the evidence is not sufficient to judge “expectation” damages, two other measures of damages that may be used are “reliance” damages and “restitution” damages. Reliance damages are awarded to restore the injured party to the position the party would have been in if there were no contract. Restitution damages are used to release the parties from their contractual obligations and to return any money the injured party gave to the breaching party. *See* E. Allen Farnsworth, *Contracts* §§ 12.8, 12.16 (1992) (reliance damages) and §§ 12.19, 12.20 (restitution damages).

³² Restatement (Second) of Contracts § 243(4).

³³ *See Anusyewski v. Jurevic*, 566 A.2d 742 (Me. 1989). In this case the court decided that homeowners suing a builder for breach of a construction contract were entitled to recover actual costs to fix any defective construction work, including a general contractor’s mark-up for overhead and profit, provided that the jury concluded that it would be reasonable for the homeowners to hire such contractor to provide repairs and to complete the work.

towed to another garage, your damages would include the towing cost as well as the cost of the second round of repairs. But you would have to prove the faulty workmanship of the first garage and show that the costs and the second repair job were both reasonable. Businesses injured by a breach of contract can seek reimbursement not only for expenses but also for lost profits.

B. Contract For Goods

When consumers purchase defective goods they are protected by laws such as the Uniform Commercial Code (U.C.C.), which establishes rules for express and implied warranties (*see* Chapter 4, Consumer Goods and the Maine Express And Implied Warranty Law). When there is a serious breach of express or implied warranty, the buyer may be able to sue to dissolve the contract (rescission) and recover the entire price (restitution). Or the consumer may sue on the breach of express warranty and receive *free repairs or damages*.

C. Measure of Damages

The measure of damages for breach of contract is the difference between the actual value of the product the consumer received and the value of the product as it was warranted to the consumer.³⁴ The Maine U.C.C. also says consumers should not only get their money back for defective products but also be reimbursed for “incidental” and “consequential” damages (expenses related to a contract breach).³⁵ For instance, suppose John purchased a seriously defective washing machine. John could take the machine back to the store and get his money back. In addition, John may be able to get the cost of shipping the machine back to the manufacturer (incidental damages) as well as the cost of washing the clothes at a laundromat until a new machine is purchased (consequential damages). If the seller breaches the contract, the consumer may deduct reasonable damages from any contract payments still due (11 M.R.S.A. § 2-717).

D. Specific Performance

Normally, the courts resolve contract disputes by awarding damages. The breaching party is ordered to pay for the actual damages incurred by the victim of the contract breach. Yet there are times when damages do not provide adequate relief to the injured party. In such cases, the court may find the only solution is “specific performance rule.” For example, when a merchant sells a defective item in breach of warranty, the court might order the merchant to repair the item so that it meets warranty standards. Ordering repairs is a form of specific performance.

The specific performance rule requires that the services outlined in the contract be performed by the party who committed the contract breach. This specific performance remedy is often granted in disputes over real estate sales. Individual pieces of property are considered unique and sometimes monetary awards are not enough to completely cover the damages. If someone signs a contract to sell you a house, then attempts to sell it to someone else for a higher price, you might be able to stop this action with a lawsuit. You would claim the real estate was unique and then ask the court to order performance of your original agreement. Conversely, specific performance is not often ordered if the sale item possesses no unique characteristics, for example, an ordinary automobile.

E. Consumer Breach of Contract

If a consumer breaches a contract, it is likely that the consumer will have to pay the consequences. Consider the 1964 Massachusetts case of *Ludwig, Inc. v. Tobey*.³⁶ Ms. Tobey purchased a “petite” size mink jacket from merchant Ludwig. The price was \$2,200. She signed a sales slip and requested that the jacket be altered to be even smaller, so that it would fit her properly. After the alteration was

³⁴ *Phillips v. Ripley Fletcher Co.*, 541 A.2d 946, 950 (Me. 1988).

³⁵ 11 M.R.S.A. §§ 2-714, 2-715 (1964).

³⁶ 5 U.C.C. Reporting Service 832 (Mass. App. Feb. 28, 1964).

completed Tobey refused to pay, saying the stole was now too little and fragile. Ludwig then sought to sell the stole to other customers but to no avail. Finally, he sued Tobey for breach of contract. At the time of the trial the stole's value was estimated at only \$1,000. Nevertheless, Tobey was required to pay as damages the full purchase price of \$2,200, with interest, and was forced to accept the stole. Normally, under the Uniform Commercial Code (U.C.C.), the seller would resell the rejected item and the damages owed by the buyer would be the difference between the sale price and the original price. But if an item simply will not sell—such as a mink stole too small for any other buyer—the merchant can hold the item for the buyer and sue for the original selling price. If it were the seller who breached the contract, then the buyer may deduct damages resulting from the breach from any part of the price still due under the contract.³⁷

Specific performance, however, is rarely ordered in “personal services” contracts, which are usually employment contracts. An opera singer cannot be forced to sing. A baseball player cannot be required to swing a bat.³⁸ If a personal service contract is broken by the employee, the employee will most likely have to pay back the employer for any reasonable damages.

Keep in mind that the person who is injured by a breach of contract must attempt to mitigate (minimize) the damages.³⁹

F. Punitive Damages

Normally, the courts will not order extra punishment for someone who breaks a contract. Awards of “punitive” damages are not common in contract law. But there are occasions when the courts award such extra damages when a contract breach was committed with malice and fraudulent deceit.⁴⁰ Of course, if you pay for goods or services with a check you know will not be honored (*i.e.*, a check that you know will “bounce”), you can be charged with the crime of Negotiating A Worthless Instrument (17-A M.R.S.A. § 708).

For instance, in the 1972 Arizona case of *Fousel v. Ted Walker Mobile Homes, Inc.*,⁴¹ the Fousels purchased a mobile home based on an impressive model home shown to them. What they actually received was a run-down home, completely different from the showroom model. The Fousels not only got their money back; they received \$10,000 in punitive damages.

G. Attorney Fees

The general rule is that attorney fees are not recoverable from a lawsuit over a contract dispute. Exceptions to the rule arise when the contract specifies that attorney fees be paid in case of a breach or when a specific state or federal statute authorizes the court to award these fees. The Maine Unfair Trade Practices Act, 5 M.R.S.A. § 213(2), awards attorney fees to consumers who can prove they have been the victims of an unfair trade practice. *See* Chapter 3 of this Guide.

§ 2. 10. Accord And Satisfaction

An “Accord and Satisfaction” agreement allows parties who believe their contract has been breached to enter into a new agreement that settles their dispute. Accord and satisfaction occurs when

³⁷ 11 MRSA §2-717; *See Adamatic v. Progressive Baking Co., Inc.*, 667 A.2d 871, 874 (Me.1995).

³⁸ *See Restatement (Second) of Contracts* § 367 comment b, illustration 1 (1981).

³⁹ *See Schiavi Mobile Homes, Inc. v. Gironda*, 463 A.2d 722, 724-25 (Me. 1983) (the duty to mitigate damages is implicit in the U.C.C.'s “broad requirements of good faith, commercial reasonableness and fair dealing,” 11 MRSA § 1-203, 2-103).

⁴⁰ In Maine, the injured party must show “malice.” *See Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). *See also Hibschan Pontiac, Inc. v. Batchelor*, 340 N.E.2d 377, 385 (Ind. Ct. App. 1976) (Garrad, J., concurring). In this case, the court found that the inability or refusal of the dealer to repair the buyer's automobile would support an action for breach of warranty but was not so malicious as to also justify punitive damages.

⁴¹ 602 P.2d 507 (Ariz. App. 1979).

both parties want to quickly resolve a contract dispute by entering into a new agreement, usually with one party accepting the other party's contract revision.

Accord and satisfaction agreements are often reached in consumer transactions when a dissatisfied consumer sends the seller a check for less than the contract amount and writes on the check "payment in full." If the merchant cashes the check, then accord and satisfaction is complete and the dispute is considered legally resolved. Some judges allow the creditor to cross out the "payment in full" language and then cash the check. Other judges do not allow it. For instance, in 1985, a Utah court ruled that Marton Remodeling accepted a consumer's payment of \$5,000, even though Marton Remodeling's final bill was \$6,538.12.⁴² The home repair customer, who thought the final bill was excessive, sent Marton Remodeling a \$5,000 check. On the back of the check, the customer wrote that cashing the check "constitutes full and final satisfaction of any and all claims."⁴³ Marton Remodeling wrote "not a full payment" on the check before cashing it. Nonetheless, the court found that Marton Remodeling had entered into an accord and satisfaction agreement simply by cashing the check.

A consumer seeking to enter into an accord and satisfaction agreement can write on any check sent to the seller the following language:

Payment in full. By cashing this check (creditor's name) agrees that (consumer's name) does not owe any more money. If this check is returned or destroyed this means (creditor's name) has rejected these conditions.

While there is no guarantee that Maine courts will accept this approach,⁴⁴ it can be an effective way to resolve bona fide disputes over the amount a consumer owes.

⁴² *Marton Remodeling v. Jensen*, 706 P.2d 607 (Utah 1985).

⁴³ *Id.* at 608.

⁴⁴ See *E.S.Herrick v. Maine Wild Blueberry Co.*, 670 A.2d 944, 946 (Me.1995) ("We have consistently concluded that a check bearing language that states 'full and final payment' or 'in satisfaction of all claims' creates an accord and satisfaction when cashed or deposited by the payee.").

§ 2. 11. Contract Release

After a breach of contract dispute has been settled the parties will sometimes agree to enter into a formal “release” of all contract obligations. If the parties so desire, this release could be notarized by both parties. A simple consumer dispute release might look like this:

CONSUMER DISPUTE RELEASE

1. I, _____ (name of person signing release), Consumer Purchaser, sign this release so that the Business’s liabilities and obligations are eliminated as described below in paragraph two.
2. Consumer Purchaser hereby releases _____ (name of Business or person being released), from all known and unknown claims that have or can arise from (describe the date and nature of the disputed contract):

3. In exchange for granting this release Consumer Purchaser has received or will receive from the Business the following (describe money or action or something else of value the person signing the release has received or will receive from the other party):

4. If the Business fails to accomplish the requirements of paragraph 3 by _____ (a specific date), then this Release is void.
5. This Release was entered into on _____, 20_____
at _____ (city and state).

Consumer Purchaser’s signature

§ 2.12. Negotiating A Contract

There are some consumer contracts you should not enter into without the assistance of a lawyer. For instance, never purchase a house or property without having a lawyer examine the quality of the title. However, there are many contracts that you can easily negotiate yourself. In succeeding chapters, we describe many such contracts (leases, home repair contracts, etc.).

As we mentioned earlier (*see* § 2.3), the Statute of Frauds requires certain contracts be in writing. Other contracts should be in writing because of their complexity. When entering into a written contract, here are some basic rules to keep in mind:

A. A Contract Is A Bargain

Remember that a contract is a bargain in which rights and obligations are allocated. As Justice Holmes said, “every contract is the acceptance of some inequality.”⁴⁵ The lesson is clear: negotiate! Do not be reluctant to suggest terms that are important to you or reject terms that disturb you. If a provision in a preprinted form contract is unfair, cross it out. If there is a provision governing damages for breach (a “liquidated damages clause”), read it carefully. If it is too onerous, cross it out or adjust the damages amount (*see* Chapter 5 of this Guide, § 5.10). All parties to a printed contract should initial any hand written changes.

B. Contracts Should Be In “Plain English”

There are no magic phrases that transform everyday words into legally binding language. Remember to include these basics in any contract: the offer and its acceptance, each party’s obligations, and the money to be paid or act to be performed.

C. Read The Contract

Of course, you should always take the time to read the contract very carefully. Keep in mind the Latin phrase *caveat emptor*, which means, “let the buyer beware.” Read the fine print of any document. If you do not, you may be unpleasantly surprised. For instance, automobile contracts are usually quite detailed, causing many consumers to skip over the fine print. Unfortunately, many car buyers later discover that they purchased, without realizing it, credit life insurance or an expensive service contract.

§ 2.13. Questions To Ask When Analyzing A Consumer Contract

A. Is There An Enforceable Contract?

A binding contract must always consist of an *offer*, an *acceptance*, *consideration* (value) flowing between both parties, and *mutual agreement*. *See* § 2.2.

Contracts for goods worth more than \$500 must be in writing to be enforceable, except when the goods are being specially made for the buyer or have already been accepted and paid for. Contracts for the sale of land must also be in writing. *See* § 2.3.

Minors still living with their parents cannot enter into enforceable contracts except for necessities (e.g., food, clothing, real estate) *See* § 2.4.

⁴⁵ *Power Manufacturing Co. v. Saunders*, 274 U.S. 490, 498 (1972).

B. Is The Contract Between A Merchant And A Consumer?

If the contract is between a merchant and a consumer and the merchant seems to have breached the terms of the contract, then you should ask:

- (1) Have the terms of the contract been significantly breached, including breach of any express warranty?
- (2) Has the Maine Uniform Commercial Code (U.C.C.) been violated? Is the contract *unconscionable*? Have any *implied warranties of merchantability or warranties of fitness for a particular purpose* been breached? If so, damages, including consequential damages (caused by the breach) and incidental damages (cost of enforcing rights) may be recoverable. Remember, except for used cars, all consumer goods sold in Maine come with an implied warranty of merchantability.
- (3) Does the contract violate the *Maine Unfair Trade Practices Act*? If so the following remedies may be available: *damages*, an *injunction*, *restitution* (money back), *attorney fees* (if a private suit under 5 M.R.S.A. § 213). See Chapter 3 in this Guide, Maine Unfair Trade Practices Act.
- (4) When there is a serious breach of an express or implied warranty, which cannot be fixed, the buyer may sue for rescission and recover the purchase price; or he may sue on the warranty and recover damages sufficient to repair the defect. See §§ 2.6-2.9 of this Guide.

C. Is The Contract A Casual Sale Between Consumers?

If the contract is not a merchant-to-consumer transaction but rather a casual sale between two persons, you should ask whether any express contract terms have been breached, including any express warranties. If so, damages may be appropriate (putting the injured party in the position he or she would have occupied if the contract had been properly performed). Casual sales do not have the protection of such laws as the Maine Uniform Commercial Code or the Maine Unfair Trade Practices Act. However, if you do enter into casual sales, you can hold the other party responsible for breach of promises or for serious misrepresentations that you relied upon.

D. Should You Sign The Contract?

Some contracts are not enforceable unless all parties sign.⁴⁶ Each person signing should also date his or her signature. Cross out any blank spaces to avoid troublesome additions after signing. All parties should receive a copy of the contract as soon as it has been signed.

E. Are All Promises In Writing?

If your decision to enter into a contract was based in part on oral promises, make sure these promises are included in the written contract. The parol evidence rule may prohibit you from introducing oral evidence in a later contract dispute. All too often, mere oral promises are not admissible evidence. If there is not room on a form contract to insert additional terms, write the promises out on a separate page. Number the pages and refer to this separate page at the end of the form contract. All parties should sign and date this additional page. All contract pages should be fastened together.

⁴⁶ For example, contracts resulting from a door-to-door solicitation must be signed by both parties. See 9-A M.R.S.A. §3-503 and Chapter 13 of this Guide.

F. Have You Reduced To Writing All Contract Changes?

A common theme in homeowner-versus-contractor disputes relates to contract changes. “We agreed to one price,” thunders the homeowner. “But you insisted on adding the orange Jacuzzi,” retorts the contractor. Both parties should sign and date any change order. Maine law requires all home construction or remodeling contracts for more than \$3,000 to be in writing. Any Change Orders must also be in writing. *See* Chapter 17 of this Guide.

G. Did You Guarantee (“Co-Sign”) A Contract Debt Only After Careful Thought?

Contemplate all the possible pitfalls before co-signing a contract as a guarantor. Certainly, don’t rush into it, even if the co-signer is a family member or a friend. Guarantors take only the liabilities and receive no benefits.

H. Should I Consult A Lawyer?

If a contract confuses you, consult a lawyer. A brief visit with a lawyer is relatively inexpensive and an experienced lawyer will quickly spot any major flaws.